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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,)	
)	NO. CR-06-0069-FVS
Plaintiff,)	
vs.)	Memorandum in Support of
)	John Black's Motion to Quash
JOHN RICHARD BLACK,)	Subpoena and Suppress Records
)	Pursuant to FRCrP 17(c)(2)
Defendant.)	

Previously, the United States, through a grand jury subpoena, has obtained medical records of Mr. Black. Counsel has inquired as to the authority and basis for such a subpoena and was told essentially that records were obtained by grand jury subpoena and no search warrant was used to obtain those records.

1 On or about August 31, 2006, the administrative subpoenas in this case were
2 issued by the FAA's attorney to obtain Mr. Black's records.

3 Limitations apply to both grand jury and administrative subpoenas, and the
4 subpoena should be quashed, or alternatively, the information provided should be
5 suppressed.
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7 ***a. Federal Rule of Criminal Procedure 17(c)(2) recognizes that subpoena***
8 ***power is not unlimited.***

9 Fed. R. Crim. P. 17(c)(2) states: "On motion made promptly, the court may
10 quash or modify the subpoena if compliance would be unreasonable or
11 oppressive." Thus, a subpoena's powers are limited.
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13 "The grand jury's subpoena power is not unlimited." United States v.
14 Calandra, 414 U.S. 338, 346, (1974). "It may consider incompetent evidence, but
15 it may not itself violate a valid privilege, whether established by the Constitution,
16 statutes, or the common law." Id. at 346 (citing Branzburg v. Hayes, 408 U.S. 665
17 (1972)). "The grand jury is also without power to invade a legitimate privacy
18 interest protected by the Fourth Amendment. A grand jury's subpoena duces
19 tecum will be disallowed if it is 'far too sweeping in its terms to be regarded as
20 reasonable' under the Fourth Amendment." Id. at 346. (citing Hale v. Henkel, 201
21 U.S. 43, 76 (1906).
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1 Also, general rules of practice prescribed by the United States Supreme
2 Court “shall not abridge, enlarge or modify any substantive right. All laws in
3 conflict with such rules shall be of no further force or effect after such rules have
4 taken effect”. 28 U.S.C. § 2072(b) (2006). The subpoena powers are based upon
5 general rules of practice, Fed. R. Crim. P 17(c), but may not abrogate substantive
6 rights.
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9 The FAA cites to 49 U.S.C. § 46104(a) as its authority for power to
10 subpoena witnesses and documents; however, that power does not include the right
11 to trample on constitutional substantive rights.
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13 For the reasons set forth below, the subpoena issued by the FAA to obtain
14 John Black’s medical records is unreasonable and oppressive.
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16 ***b. A privilege exists between patient and doctor that precludes disclosure
17 of confidential information.***

18 In Jaffee v. Redmond, 518 U.S. 1, 9 (1996), the United States Supreme
19 Court was presented with the question of whether, under Fed. R. Evid. 501, a
20 privilege exists protecting confidential communications between a psychotherapist
21 and a patient. Id. At 9-10. The Court held that it did. Id. at 18. The respondent in
22 the case was ordered by the trial court to provide the petitioner the contents of her
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1 conversations with her psychotherapist. Id. at 5-6. The petitioner was suing the
2 respondent in a wrongful-death action, claiming the respondent, a police officer,
3 had used excessive force while on duty. Id. at 4-6. The Supreme Court granted
4 *certiorari* based on the split in the Courts of Appeals on whether a
5 patient/psychotherapist privilege exists. Id. at 7-8.

7 The Supreme Court analyzed the issues in Jaffee, and reasoned that “Like
8 the spousal and attorney-client privileges, the psychotherapist-patient privilege is
9 ‘rooted in the imperative need for confidence and trust’”. Id. at 9-10. Not only did
10 the Court recognize that the privilege serves to protect the private interests of an
11 individual by allowing confidential disclosures without embarrassment, but also
12 such a privilege protects the public’s interests, as well. Id. at 10. The Court noted
13 the privilege facilitates “the provision of appropriate treatment for individuals
14 suffering the effects of a mental or emotional problem”, and that thereby “the
15 mental health of our citizenry, no less than its physical health, is a public good of
16 transcendent importance”. Id. at 11.

17 Finally, the Court held that the psychotherapist-patient privilege applies
18 equally to “communications made to licensed psychiatrists and psychologists . . .
19 [as well as] licensed social workers in the course of psychotherapy”. Id. at 15. The
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1 Court added that it would not recognize a balancing test employed by some courts
2 to decide whether such privilege should be waived, stating:

3 Making the promise of confidentiality contingent upon a trial
4 judge's later evaluation of the relative importance of the
5 patient's interest in privacy and the evidentiary need for
6 disclosure would eviscerate the effectiveness of the privilege.
7 As we explained in Upjohn, if the purpose of the privilege is to
8 be served, the participants in the confidential conversation
9 "must be able to predict with some degree of certainty whether
10 particular discussions will be protected. An uncertain
11 privilege, or one which purports to be certain but results in
12 widely varying applications by the courts, is little better than
13 no privilege at all." 499 U.S. at 393.

14 Id. at 17-18 (citations included). See also Oleszko v. State Compensation Ins.
15 Fund, 243 F.3d 1154, 1157-59 (9th Cir. 2001) (extending the privilege in Jaffee to
16 Employee Assistance Program personnel for employees seeking mental health
17 treatment).

18 Mr. Black should be afforded the same protection that Jaffee provided. Any
19 comments Mr. Black made to treating physicians were strictly privileged and made
20 in confidence. To allow Mr. Black's statements to be divulged would put a chilling
21 effect on medical treatment, and set a dangerous precedent. Patients will no longer
22 feel comfortable confiding in their doctors, which will potentially lead to improper
23 treatment.

1 To allow the FAA to subpoena medical records creates a chilling effect on a
2 patient's relationship with his or her doctor. A dangerous precedent will be set, if
3 the FAA can use such subpoenas, whereby patients will hesitate or not inform their
4 doctors of their health concerns at all. The physician-patient privilege has existed
5 for centuries, and to abrogate its inherent importance would be a loss to society.
6 For example, if a patient were a drug-user seeking treatment and rehabilitation, his
7 ability to speak with a physician openly about his treatment would be hindered by
8 his concerns that whatever he tells his physician would end in criminal charges.
9 The ability to treat patients effectively and with open communication will be
10 forever stymied should such unlimited subpoena power be allowed.
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13 *i. Washington State law also recognizes that statements made to*
14 *medical personnel are not admissible as evidence.*

15 Washington State also recognizes the importance of privileged
16 communications between a physician and patient. Statements made by criminal
17 defendants to medical personal may not be admitted into evidence at trial without
18 the patient's consent. State v. Godsey, 131 Wn. App. 278, 286 (2006). In Godsey,
19 the defendant was transported to the hospital for injuries. Id. at 283-84. While
20 being treated, and in the presence of law enforcement, the defendant admitted to
21 medical personnel that he had been using methamphetamines regularly for the past
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1 year. Id. The defendant's statements were later admitted against him at trial by the
 2 law enforcement officer who had been present during treatment. Id. at 285. The
 3 Washington Appellate Court reversed the defendant's conviction for use of drug
 4 paraphernalia, holding that the defendant's statements should not have been
 5 admitted at trial as they "violated his right to physician-patient confidentiality". Id.
 6 at 286.

8 *c. The Fifth Amendment protects communications to a grand jury and*
 9 *a treating physician.*

10 The Fifth Amendment of the United States Constitution states that "No
 11 person shall be . . . compelled in any criminal case to be a witness against
 12 himself". U.S. Const. Amend. V. For the Fifth Amendment to apply, an
 13 individual must invoke the privilege or his statements will not be considered to
 14 have been "compelled". United States v. Saechao, 418 F.3d 1073, 1077 (9th Cir.
 15 2005). However, there are exceptions. Id. If "an individual is subjected to a
 16 practice that den[ies him] ... a free choice to admit, to deny, or to refuse an answer,
 17 then any statement he makes is considered involuntary and cannot be used in a
 18 criminal proceeding." Id. (citations & quotations omitted). Under such
 19 circumstances, the Fifth Amendment is considered to be self-executing and an
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1 individual does not need to invoke the privilege in order for his admissions to be
2 suppressible. Id.

3 A grand jury may not compel a person to produce books and papers that
4 would incriminate him. Boyd v. United States, 116 U.S. 616, 633-35 (1886).

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6 Any statements made to a treating physician by John Black were not made
7 with a knowing waiver of his Fifth Amendment rights. Mr. Black made statements
8 to his treating physicians in confidence, with the understanding that such
9 statements would not be released to any other person. Thus, even if his physicians
10 are required to disclose the information contained in his medical records, disclosure
11 of any incriminating statements in the medical records would result in the self-
12 executing exception to the Fifth Amendment. Mr. Black did not make statements
13 to his physicians with the knowledge that he was jeopardizing his Fifth
14 Amendment rights, and as such the Fifth Amendment automatically applies to
15 those statements whether he officially invoked the privilege or not.
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18 ***d. Under “HIPAA” regulations, an administrative agency’s powers to***
19 ***subpoena are limited.***

20 Pursuant to § 45 C.F.R. 164.512(f)(1)(ii), a health care provider may only
21 reveal patient information to law enforcement under specific circumstances:
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1 A covered entity may disclose protected health information for
 2 a law enforcement purpose to a law enforcement official if . . .
 3 (ii) In compliance with and as limited by the relevant
 4 requirements of . . . (C) An administrative request, including
 5 an administrative subpoena or summons, a civil or authorized
 6 investigative demand, or similar process authorized under law,
 7 provided that: **(1) The information sought is relevant and**
 8 **material to a legitimate law enforcement inquiry; (2) The**
 9 **request is specific and limited in scope to the extent**
 10 **reasonably practicable in light of the purpose for which the**
 11 **information is sought; and (3) De-identified information**
 12 **could not reasonably be used.**

13 § 45 C.F.R. 164.512(f)(1)(ii)(C).

14 The FAA must comply with HIPPA regulations in order to subpoena Mr.
 15 Black's medical information. The FAA may not use a subpoena to go fishing
 16 through Mr. Black's medical records for evidence of wrongdoing. The Defendant
 17 asks that this Court determine that these requirements have not been met under
 18 HIPPA.

19 *e. The Defendant was not given any notice of the subpoenas issued by*
 20 *the FAA.*

21 In Northwestern Mem'l Hospital v. Ashcroft, 362 F.3d 923 (7th Cir. 2004),
 22 the Court stated that the HIPPA standard for disclosure in response to a subpoena
 23 requires notice and "the notice to the patient must contain 'sufficient information
 24 about the litigation or proceeding in which the protected health information is

1 requested to permit the individual to raise an objection to the court.” Id. at 926.
2 (citing CFR 45 § 164.512(e)(1)(iii)(B)). “The objection in court would often be
3 based on privilege—the source of which would be found elsewhere than in the
4 regulations themselves.” Id. at 926. The 7th Circuit noted that if the hospital in
5 Northwestern disclosed medical records of certain women who had had abortions,
6 a violation of privacy rights would result, and lead the patients to lose faith in the
7 hospital: “If Northwestern Memorial Hospital cannot shield its abortion patients’
8 records from disclosure in judicial proceedings, moreover, the hospital will lose the
9 confidence of its patients, and persons with sensitive medical conditions may be
10 inclined to turn elsewhere for medical treatment.” Id. at 929.
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14 Mr. Black’s constitutional right to privacy is at stake, and neither the FAA
15 nor the Government should have the authority to seek private, confidential,
16 privileged medical records concerning his treatment, especially without prior notice
17 to the patient. The records were created under the guise of confidentiality, and they
18 should remain confidential.
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CONCLUSION

WHEREFORE, the Defendant respectfully requests the Court grant his motion to quash and/or suppress the subpoenas issued by the FAA to acquire his medical records.

RESPECTFULLY SUBMITTED, this 7th day of September, 2006.

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CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of September, 2006, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the following:

Earl A. Hicks, Assistant United States Attorney

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